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No. 07-692

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In The Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

WHITE COUNTY, GEORGIA SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE INTER-CIRCUIT CONFLICTS

This Court's decision in *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987), does not militate against a grant of certiorari in the instant case. In *Kibbe* the petitioner, after obtaining review regarding a different issue, sought to challenge the correctness of a particular jury instruction. In the district court, however, the petitioner had never disputed the instruction at issue; to the contrary, the petitioner had itself proposed an instruction that was the same, in relevant particulars, as the very jury instruction which it subsequently attacked in this Court. (480 U.S. at 258). It was at best unclear whether the appellate decision in *Kibbe* had even passed on the correctness of that instruction. (480 U.S. at 259). In refusing to permit the petitioner to challenge that instruction, the Court relied in particular on Rule 51 of the Federal Rules of Civil Procedure, which provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." See 480 U.S. at 259 ("there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested.") The Court noted that the petitioner had offered no explanation of its failure to object to that instruction in the lower courts. 480 U.S. at 258-59.

Respondents argue that in the instant case the petitioners in the litigation below inexcusably failed in the courts below to challenge the controlling "Eleventh Circuit precedent."[1] Here, unlike *Kibbe*, there is an obvious and compelling explanation for the manner in which petitioners proceeded in the lower courts: the body of law which petitioners did not attack in the district court and court of appeals was binding Eleventh Circuit precedent. Respondents object that "[p]etitioners accepted Eleventh Circuit precedent totally until they lost on appeal." (Br. Op. 22). But in the litigation below, both the district judge and the appellate panel were required to follow Eleventh Circuit precedent.[2] In the Eleventh Circuit litigants are under the same obligation as district court and appellate judges to "accept[ ] Eleventh Circuit precedent." No decision of this Court requires,

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[1] Br. Op. i ("[p]etitioners did not . . . question the soundness of Eleventh Circuit precedent"), 16 (petitioners did not "question[ ] Eleventh Circuit precedent"), 17 (petitioners' appellate brief did not include "criticism . . . of the Eleventh Circuit[ ]"), 18 ("[p]etitioners did not express any misgiving about the soundness of Eleventh Circuit precedent.")

[2] "[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993). "The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision." *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997).

Eleventh Circuit Rule 36, I.O.P. 2 ("Under the law of this circuit, published opinions are binding precedent.")

or even encourages, litigants to make the futile if not vexatious gesture of urging lower court judges to disregard binding circuit precedent.

For example, the Eleventh Circuit "history of widespread abuse" standard governing section 1983 supervisory liability, which the district court and panel applied in this case, was controlling authority to which both the district court and the appellate panel were obligated to adhere. That circuit's "history of widespread abuse" requirement was first announced by the Eleventh Circuit more than twenty years ago. By the time of the appellate decision in the instant case, that standard had been reiterated in eighteen reported and eight unreported Eleventh Circuit decisions.[3] Virtually every member of the Eleventh Circuit had by then joined several of the decisions announcing this rule. The Eleventh Circuit itself had repeatedly described its standard governing supervisory liability as "well established" and "well settled."

Respondents also object that petitioners did not seek rehearing en banc with regard to the Eleventh Circuit's section 1983 supervisory liability standard. (Br. Op. 18-19). But this Court has never required litigants, as a precondition of certiorari, to first seek en banc review. En banc review imposes substantial burdens on the appellate courts, and is rarely granted. "En banc hearing or rehearing is not favored." Fed. R.

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[3] We set forth a list of those cases in an appendix to this brief.

App. P. 35(a). In the overwhelming majority of cases in which certiorari is granted by this Court, the petitioner had not sought en banc review. The Eleventh Circuit Rules limit en banc review in that circuit to cases in which a panel opinion is "in conflict with precedent of the Supreme Court or of this circuit." (11th Cir. Rule 35-3).[4] Thus the inter-circuit conflict described in the petition would not have been a legally sufficient basis on which to seek rehearing en banc in the Eleventh Circuit. Consistent with the practice of this Court, the Eleventh Circuit Rules emphasize that "the filing of a petition for . . . rehearing en banc is not a prerequisite to filing a petition for writ of certiorari." *Id.*

Respondents suggest that they might still prevail even if this Court were to adopt the less stringent section 1983 and Title IX standards utilized by circuits other than the Eleventh Circuit. (Br. Op. ii, 4, 23). If this Court were to reject the Eleventh Circuit's own standard regarding either supervisory liability or Title IX, the application of the proper standard would appropriately be left to the lower courts on remand. As the Brief in Opposition itself demonstrates, the facts of this case are complex and in important particulars are hotly disputed. (Br. Op. 5-15). The application of a different set of standards to that record

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[4] The Eleventh Circuit Rules also permit a petition for rehearing en banc if the panel decision is "precedent setting." 11th Cir. Rule 35-3. In this case, however, the precedent involved had been set many years earlier.

therefore would best be undertaken by the district court. The evidence supporting petitioners' claims is sufficiently strong that there is good reason to anticipate that it would suffice on remand under a less demanding section 1983 or Title IX standard. The district judge, after all, thought the danger of sexual abuse in instant case was sufficiently manifest as to satisfy even the exceptionally stringent Eleventh Circuit standards.

Although the decision below is not officially reported, it applies two decades of reported Eleventh Circuit section 1983 decisions. Eleventh Circuit cases utilizing that circuit's well-established standards today often are not reported precisely because the precedent is so deeply entrenched. The inter-circuit conflict regarding Title IX is clearly spelled out in a series of officially reported decisions. Within the Eleventh Circuit litigants are expressly permitted to rely on unpublished appellate decisions.[5]

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[5] "[U]npublished opinions may be cited as persuasive authority." 11th Cir. Rule 36, I.O.P. 6. Rule 32.1 of the Federal Rules of Appellate Procedure now provides:

> Citation Permitted. A court may not prohibit or restrict the citation of federal judicial decisions . . . that have been:
>
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
>
> (ii) issued on or after January 1, 2007.

The decision in the instant case was issued after January 1, 2007.

II. THIS CASE PRESENTS A CLEAR INTER-CIRCUIT CONFLICT REGARDING THE STANDARD FOR EMPLOYER LIABILITY UNDER SECTION 1983

The inter-circuit conflict described in the petition regarding the standard for employer liability under section 1983 involves disagreements about three distinct subsidiary issues. First, the courts of appeals have conflicting views as to the requisite level of notice or knowledge. The varying standards utilized by the different courts of appeals include:

(a) constructive notice

(b) actual notice

(c) actual knowledge

The courts of appeals also disagree about whether the fact that must be known, or the subject of the notice, is:

(a) a risk of constitutional violation

(b) a substantial risk of constitutional violation

(c) a past constitutional violation

(d) a history of widespread constitutional violations

(e) that the subordinate will in fact commit a constitutional violation in the future

The inter-circuit conflict includes as well several quite different standards for assessing the supervisor's

action in the wake of the requisite notice or knowledge:

> (a) failing to take effective action to prevent the constitutional violation
>
> (b) acting with deliberate indifference to the possibility of a constitutional violation
>
> (c) completely ignoring the risk of a constitutional violation
>
> (d) acquiescing in the constitutional violation
>
> (e) approving of the constitutional violation

(Pet. 10-27). The significant number of possible combinations of these variables has given rise to an unusually complex inter-circuit conflict.

In the Eleventh Circuit respondents acknowledged the existence of an inter-circuit conflict regarding the standard of supervisory liability.[6] In this

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[6] In the court of appeals respondents argued that "[s]ection 1983 liability . . . should not apply unless . . . a supervisor has actual notice of the subordinate's constitutional wrongdoing and yet fails to take any action to stop it." (Brief of Appellants/Defendants White County School Dist., et al., p. 23). In a footnote to this assertion respondents correctly observed:

> Some circuits, such as the Fourth Circuit, apply a constructive notice standard to determine supervisory liability. *See Baynard v. Malone*, 268 F.3d 228 ([4]th Cir. 2001). This is a negligence standard; it is, in effect, the standard that the district court applied below. This Court has never taken that approach.

(Continued on following page)

Court, however, respondents seek to dismiss these starkly different standards as mere "language variations," insisting that in practice it would not "matter greatly" which of these formulations the courts use. (Br. Op. 34; see Br. Op. 22 (differences in standards are "semantic")). To the contrary, the choice among such standards is one of the central recurring issues in the law, a question which in various contexts governs not only whether a particular defendant can be held liable but also whether a constitutional violation has occurred at all. This Court has repeatedly granted review to distinguish among these distinct standards.

For example, prior to *Farmer v. Brennan*, 511 U.S. 825 (1994), although all the circuit courts had agreed that certain types of Eighth Amendment violations required proof of deliberate indifference, the "Courts of Appeals had adopted inconsistent tests for 'deliberate indifference,'" 511 U.S. at 832. The Court granted certiorari in *Farmer* "to define the term 'deliberate indifference'" in the Eighth Amendment context. 511 U.S. at 829. Similarly, the "varying approaches" to school district liability under Title IX that prompted this Court to grant review in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), included a conflict as to whether a showing of deliberate indifference could be based on what school

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Id. at 23 n.20. The petition described the Fourth Circuit's adherence to the constructive notice standard. (Pet. 15 and n.16).

officials "should have" known. *Compare Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014, 1028-29 (7th Cir. 1997) (refusing to impose liability under Title IX based on showing school officials "should have known" of discrimination) *with Karucunas v. Iona College*, 119 F.2d 80, 88 (2d Cir. 1997) (applying constructive notice standard to Title IX claims) and *Kinman v. Omaha Public School Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (same).

Respondents suggest that past decisions of this Court have already established the standard of supervisory liability in a section 1983 case. (Br. Op. 22, 28, 30, 34). That is not the case. *City of Canton v. Harris*, 489 U.S. 378 (1989), and *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), concerned the standard governing municipal liability under section 1983. *Farmer v. Brennan* determined when official indifference to the safety or medical needs of prisoners violates the Eighth Amendment. *Gebser* and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), decided the standard for imposing liability on school boards under Title IX. *Daniels v. Williams*, 474 U.S. 327 (1986), addressed the degree of culpability that is required to constitute a deprivation under the Due Process Clause. None of these decisions considered when, or even whether, a supervisor could be held liable in a section 1983 action for the conduct of his or her subordinates.

The lines of cases relied on by respondents do not even establish a single standard. *Canton*, which concerns the standard of liability of municipalities

under section 1983, permits imposition of liability based on constructive knowledge. Even if city officials have not actually come to a subjective realization that their policies entail a risk of constitutional violation, the city may still be liable if that risk – although unrecognized – should have been "obvious." 489 U.S. at 390. Several members of this Court noted that this permits the imposition of liability where policymakers were "on actual or constructive notice." 489 U.S. at 396 (O'Connor, J., concurring).

In *Farmer v. Brennan*, 511 U.S. 825 (1994), on the other hand, this Court expressly rejected that *Canton* standard. The issue in *Farmer* was when conduct by prison officials involves the degree of recklessness forbidden by the Eighth Amendment. The petitioner in *Farmer* urged the Court to utilize the *Canton* standard, and to hold that the Cruel and Unusual Punishment clause can be violated where prison authorities should have known of the risk of injury to a prisoner, regardless of the authorities' subjective state of mind. The Court refused to apply the *Canton* standard in that context. "*Canton's* objective standard . . . is not an appropriate test for determining the liability of prison officials under the Eighth Amendment." 511 U.S. 825, 841 (1994). Thus under *Farmer*, but not under *Canton*, a claim will fail if the relevant officials were "unaware . . . of an obvious risk." 511 U.S. at 844.

In the Due Process context yet a different standard may be appropriate. *Daniels v. Williams* held only that injury caused by negligence does not constitute a

"deprivation" of life, liberty, or property. *Daniels* expressly did not resolve whether "something less than intentional conduct, such as reckless or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." 474 U.S. at 334 n.3. It is possible that the Court will ultimately conclude that only intentional conduct, not *Canton* deliberate indifference or *Farmer* deliberate indifference,[7] is the standard under the Due Process Clause.

These decisions are not, as respondents suggest, "closely relat[ed]" to the issue in this case. (Br. Op. 24). The decisions in *Farmer* and *Williams* regarding, respectively, the meaning of the Cruel and Unusual Punishment and Due Process Clauses, have nothing to do with the standard for determining when a supervisor is liable under section 1983 for a violation of the Equal Protection Clause. The decisions in *Gebser* and *Davis* regarding liability under Title IX turned on the

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[7] *Farmer* made clear that "deliberate indifference" can have different meanings in different legal contexts, and that those differences are of substantial importance.

> [W]hile deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability, . . . the "term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents," *Collins v. Harker Heights*, 503 U.S. 115, 124 (1992), a purpose the *Canton* Court found satisfied by a test permitting liability when a municipality disregards "obvious" needs.

511 U.S. at 841.

notice provision of Title IX, 20 U.S.C. § 1682, the absence of an express cause of action in Title IX, and the special principles of statutory interpretation governing Spending Clause legislation. *Gebser*, 524 U.S. at 285-90. The contours of municipal liability under section 1983 derive from the rejection in 1871 of the municipal liability provisions of the Sherman Amendment. *Monell v. Department of Social Services*, 436 U.S. 658, 664-92 (1978). These considerations underlying *Gebser*, *Davis*, *Monell*, and *Canton* have nothing to do with the standard of individual liability under section 1983, which is generally governed by the principles of tort liability that prevailed when section 1983 was enacted in the mid-nineteenth century. *E.g.*, *Pierson v. Ray*, 386 U.S. 547, 554 (1967). This Court's divergent decisions regarding the meaning of "deliberate indifference" are not necessarily relevant; this Court has yet to determine whether some form of deliberate indifference (or some other standard) governs supervisory liability under section 1983.

III. THIS CASE PRESENTS A CLEAR INTER-CIRCUIT CONFLICT REGARDING THE STANDARD OF LIABILITY UNDER TITLE IX

As the petition explains, the courts of appeals are divided as to whether the notice required by *Gebser* is notice of a substantial risk of discrimination forbidden by Title IX, or notice that such discrimination is actually occurring. (Pet. 29-37). Respondents dismiss

this difference as a mere "language variation[ ]" devoid of practical significance. (Br. Op. 34).

But as the instant case plainly illustrates, that difference in standard will often be of controlling importance. The district court below concluded that school officials were on notice that the teacher in question "was engaging in sexually inappropriate conduct with his students" (App. 31), circumstances a reasonable trier of fact could conclude constituted notice of a substantial risk that the teacher would engage in sexual molestation. But the Eleventh Circuit held that notice of such a risk is legally insufficient under *Gebser*, requiring instead that school officials must have had notice that the teacher actually "was sexually molesting students." (App. 7). Similarly, the Third, Sixth, Seventh and Tenth Circuit decisions set out in the petition all permitted imposition of liability under Title IX based on evidence that school officials were aware of the "risk" or "danger" of harassment, molestation, or other discrimination; the claims in those cases would have been dismissed under the quite different standard in the Eleventh and Fourth Circuits.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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ELEVENTH CIRCUIT CASES UTILIZING "HISTORY OF WIDESPREAD ABUSE" STANDARD

Hicks v. Ferrero, 2007 WL 1793446 *2 (11th Cir. June 22, 2007)

Mathews v. Crosby, 480 F.3d 1265, 1270 (11th Cir. 2007)

Gary v. Modena, 2006 WL 3741364 *6 (Dec. 21, 2006)

Gray v. Bostic, 458 F.3d 1295, 1306 (11th Cir. 2006)

Libman v. City of Avondale Estates, 190 Fed. Appx. 774, 777 (11th Cir. 2006)

Daniel v. United States Marshall Service, 188 Fed. Appx. 954, 963 (11th Cir. 2006)

Valdes v. Crosby, 450 F.3d 1231, 1236-37 (11th Cir. 2006)

McBride v. Rivers, 170 Fed. Appx. 648, 658 (11th Cir. 2006)

Asad v. Crosby, 158 Fed. Appx. 166, 170 (11th Cir. 2005) (supervisory liability standard "well-settled")

Sanders v. Barrett, 2005 WL 2640979 *2 (11th Cir. Oct. 17, 2005)

Young v. Fleming, 146 Fed. Appx. 393, 394 (11th Cir. 2005)

Mercado v. City of Orlando, 407 F.3d 1152, 1158 (11th Cir. 2005)

Miller v. King, 384 F.3d 1248, 1261 (11th Cir. 2004) (supervisory liability standard "well established")

Dalrymple v. Reno, 334 F.3d 991, 995-96 (11th Cir. 2003) (supervisory liability standard "well established")

Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003) (supervisory liability standard "well established")

Gonzalez v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003)

Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999) (supervisory liability standard "well established")

Braddy v. Florida Dept. of Labor and Employment Security, 133 F.3d 797, 802 (11th Cir. 1998)

Dolihite v. Maughon, 74 F.3d 1027, 1052 (11th Cir. 1996)

Cross v. State of Alabama, State Dept. of Mental Health, 49 F.3d 1458, 1490 (11th Cir. 1995)

Belcher v. City of Foley, Alabama, 30 F.3d 1390, 1398 (11th Cir. 1994)

Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990)

Greason v. Kemp, 891 F.2d 829, 837 n.18 (11th Cir. 1990)

Clark v. Evans, 840 F.2d 876, 885 (11th Cir. 1988)

Fundiller v. City of Cooper City, 777 F.3d 1436, 1443 (11th Cir. 1985)

Wilson v. Attaway, 757 F.2d 1227, 1241 (11th Cir. 1985)